

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITCHELL EARL GOLA,

Defendant-Appellant.

UNPUBLISHED

April 13, 2006

No. 259074

Livingston Circuit Court

LC Nos.

03-013323-FH and

03-013324-FH

Before: Kelly, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his two convictions for aggravated stalking, MCL 750.411i, following a bench trial. The trial court sentenced defendant to 165 days in jail and 253 days in jail and concurrent sentences of 5 years' probation.

Defendant previously pleaded guilty to misdemeanor stalking of the complainant, which resulted in an October 2002 probation order prohibiting him from being within 1,000 yards of her. In this case, the prosecution charged defendant with two separate counts of aggravated stalking, one for a November 20, 2002, incident and the other for a November 26, 2002, incident.

Defendant first contends that there was insufficient evidence to support his convictions when the complainant's testimony was inconsistent, implausible, and showed signs of exaggeration, fabrication, and paranoia. We disagree. "Generally, we review a challenge to the sufficiency of the evidence in a bench trial de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). We review the trial court's findings of fact in a bench trial for clear error, giving consideration "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

Under MCL 750.411i(2), each conviction for aggravated stalking requires proof of *any* one of the following: (a) at least one incident violates a restraining order of which the defendant has notice, or an injunction; (b) at least one incident violates a condition of probation; (c) the course of conduct includes the making of one or more credible threats against the victim, her family or someone who lives with her; or (d) the defendant was previously convicted of stalking or aggravated stalking.

The trial court noted the inconsistencies in the complainant's testimony regarding dates and details. Nonetheless the trial court was satisfied that the basic elements of aggravated stalking were established by the evidence. The record demonstrates that the complainant and Thomas Carlson testified that they saw defendant, on November 20 and November 26, within 1,000 yards of the complainant's residence, in violation of the October 2002 probation order. Deferring to the trial court's credibility determination, we conclude that there was sufficient evidence to support defendant's convictions.

Defendant next argues that one of his convictions for aggravated stalking should be vacated on double jeopardy grounds because he was convicted twice for the same course of conduct. We disagree. Because defendant did not preserve this issue, we review it for plain error affecting defendant's substantive rights. *People v Kulpinski*, 243 Mich App 8, 11; 620 NW2d 537 (2000).

Regarding the November 20, 2002, incident, the trial court ruled, "I'm satisfied that there were at least two contacts that were unconsented to" and that each would cause a reasonable person to be scared and did in fact scare the complainant. It added that the November 20, 2002, contact violated the probation order. With regard to the November 26, 2002, incident, the trial court ruled, "I'm satisfied that . . . there were contacts resulting in the issuance of the PPO. There was [sic] contacts at the Little Chef restaurant. There was contact on the 20th, there was contact on the 26th. I'm satisfied that that contact was in violation as it was with the 20th of the probation order setting 1,000 yards as the distance." The court further found that "there were two or more willful and separate acts of unconsented contact with the complainant" and that each would cause a reasonable person to be scared and did in fact scare the complainant.

Thus, it appears that the trial court found that the evidence satisfied MCL 750.411i(2)(b) (violation of a probation order). The trial court could also have found defendant guilty under MCL 750.411i(2)(d) (prior conviction of stalking or aggravated stalking) on the basis of defendant's October 2002 misdemeanor stalking conviction. See e.g., *People v White*, 212 Mich App 298, 306-307; 536 NW2d 876 (1995).

In *White*, *supra*, this Court addressed an argument, similar to defendant's, that two stalking convictions violated double jeopardy protections because the stalking behaviors were all part of a single continuous course of stalking conduct. In *White*, this Court affirmed the trial court's rejection of the defendant's double jeopardy argument because the defendant was not convicted twice for the same offense; rather, his two convictions "arose out of two distinct occurrences or episodes." *Id.* at 305-306. In *White*, an August 6, 1993, felony stalking warrant specified that the defendant violated MCL 750.411i on June 9, 1993, when he repeatedly called the victim in violation of a restraining order and made a credible threat to kill her. An August 17, 1993, misdemeanor warrant specified that the defendant violated a local stalking ordinance on July 17, 1993, when he repeatedly called the victim at work and threatened to kill her, her children, and her father. *Id.* at 306. This Court rejected the defendant's "unsupported assertion that stalking is a continuous act or offense for which he should only receive one punishment." *Id.* at 306-307.

As in *White*, defendant was charged with stalking for his actions on two different dates. The November 26, 2002, complaint related to defendant's actions on November 20, 2002. The November 27, 2002, complaint related to defendant's actions on November 26, 2002.

Defendant's convictions thus arose from two distinct occurrences or episodes, as did those in *White*. There was no double jeopardy violation.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Michael J. Talbot